U.S. Supreme Court.

Office - Supreme Court,
FILED
MAY 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 960

WILLIAM STANGER GRAY, one of the Lloyd's Underwriters,

and

ORION INSURANCE COMPANY, LTD., Insurance Company Member of the Institute of London Underwriters,

Petitioners,

v.

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	PAGE
The Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	3
Reasons for Allowance of Writ	7
Conclusion	13
Appendix:	
Opinion of the District Court	1a
Opinion of the Court of Appeals	5a

CASES CITED

Cary v. *Home Ins. Co.* (1923), 235 N. Y. 296	8
John Chandler v. *The Worcester Mutual Fire Insurance Company* (1849), 3 Cush. 328, 329, 330	9
Chicago Steamship Lines v. *U. S. Lloyds,* 2 F. (2d) 676, aff'd, 12 F. (2d) 733, *cert. den'd,* 273 U. S. 698	7–8
Fine v. *American Eagle Fire Ins. Co.* (1942), 178 Misc. 27	8
Fleisch v. *Insurance Company of North America* (1894), 58 Mo. App. 596, 607	10
Gove v. *Farmers' Mutual Fire Insurance Company* (1868), 48 N. H. 41, 43	10

NOV 3 1952

246012

PAGE

New York & Cuba Mail S. S. Co. v. *Continental Ins. Co.*, 117 F. (2d) 404, *cert. den.* 313 U. S. 580..... 12

Senn Products Corp. v. *Hartford Steam Boiler I & I Co.*, 41 N. Y. S. (2d) 133, 137 11

The Edmund Fanning, 201 F. (2d) 281 12

The Erie Lighter 108, 250 Fed. 490 12

Union Insurance Co. v. *Smith*, 124 U. S. 405, 427.... 7–8

STATUTES CITED

Limitation of Vessel Owner's Liability, 46 U. S. C. Sec. 181 et seq. 12

AUTHORITIES CITED

Chalmers, Marine Insurance Act 1906 (4 ed. 1932) pp. 142, 143 8

English Marine Insurance Act (1906) 8

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

WILLIAM STANGER GRAY, one of the Lloyd's Underwriters,

and

ORION INSURANCE COMPANY, LTD., Insurance Company Member of the Institute of London Underwriters,

Petitioners,

v.

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners herein, William Stanger Gray and Orion Insurance Company, Ltd., respectfully pray that a Writ of Certiorari be issued to review the decree of the United States Court of Appeals for the Second Circuit, entered on January 16, 1957, which reversed the decree of the United

States District Court for the Southern District of New York, directing that the libel of the Respondent herein be dismissed, and the order of the Court of Appeals entered February 5, 1957, denying Petitioners' petition for rehearing.

THE OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the Southern District of New York is printed in the appendix hereto* and is reported at 144 F. Supp. 356. The opinion of the Court of Appeals for the Second Circuit is printed in the appendix hereto and is reported at 240 F. 2d 460. The petition for a rehearing was denied without opinion and is as yet unreported.

JURISDICTION

The decree of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on January 15, 1957. A petition for rehearing directed to that Court was denied on February 5th, 1957.

This cause has been brought by a libel and complaint filed by the Respondent herein against the Petitioner seeking recovery under a contract of marine insurance for loss allegedly caused by an insured peril and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by Writ of Certiorari the decree and order complained of is conferred by 28 U. S. C. Secs. 1254(1) and 2101(c).

---

*References to the testimony contained in the Appendix submitted by Libelant-Appellant below are indicated by "Lib. A." followed by the page number.

Questions Presented

1. Whether an assured under a policy of marine insurance can sit idly by, with knowledge that insured property is in peril, with adequate means of preventing the loss readily available, and can after the loss look to his insurers for recovery.

2. Whether there exists in policies of marine insurance an implied warranty by the assured that he will act with some degree of prudence in the protection and preservation of insured property.

3. Whether every peril *on* the sea is a peril *of* the sea and whether, as this phrase is used in marine insurance, every loss *on* the sea necessarily results from a peril *of* the sea.

Statutes Involved

There are no statutes involved in this litigation.

Statement

The Petitioners, an underwriter at Lloyd's and a British insurance company, issued policies of marine insurance whereby they assured the New York, New Haven and Hartford Railroad Company (the libelant-appellant, below) against losses caused by perils of the sea to goods belonging to the assured or held by the assured as carrier and to railroad cars owned or in its possession while such goods or cars were on carfloats owned or employed by the assured.

In denying liability under the contracts of insurance and on the facts outlined hereunder and in their answer to the libel, the Petitioners maintain that the loss "was the direct

result of the willful nonfeasance of the libelant, its supervisory agents, officers and employees."

On February 9, 1951 the railroad's Carfloat No. 60, a three-track float, approximately 327 fleet long, 10½ feet deep, having a light draft of three feet, and divided into seventeen separate compartments by watertight bulkheads, was lying off the railroad's Mott Haven Yard in the Harlem River. The compartments, numbered from bow to stern, with the exception of compartments 1 and 2, had ventilator openings on deck into each compartment. These openings were only 1½ inches above deck (Lib. A. p. 3, Lib. A. p. 24). On the carfloat were thirteen empty gondola cars, five on the starboard track, five on the port track and three on the center track (Lib. A. p. 32). During the day the railroad's employees loaded some eight hundred tons of steel concrete reinforcing rods into the gondola cars from barges (Finding of Fact #3, Appendix hereto, p. 2a).

At about 3:00 p. m., the Assistant Marine Superintendent who was in charge of the railroad's marine operation and his assistant, the Marine Supervisor, were advised that the carfloat was down at the bow and had a bad list to port (Lib. A. p. 13, 27, 160, 163, 193). The Marine Supervisor inspected the carfloat and found that the gondola cars on the port side were more heavily loaded than those on the starboard side, the cars on the starboard stern being completely empty. He also found water from unknown sources in various compartments numbered from bow to stern as follows: Compartment No. 1—4 feet; No. 2—1½ feet; No. 4—2 feet; No. 7—1 foot; No. 8—2½ feet; No. 12—2 feet (Lib. A. p. 23). The carfloat, according to the testimony of the Assistant Marine Superintendent, was needed the next day "ready or not" in the railroad's regular operation, so loading was continued and

no attempt was made to determine the source of the water (Lib. A. p. 12, 13). No attempt was made to pump the compartments, although shore pumps were readily available (Lib. A. p. 173).

At about 6:00 p.m., loading operations ceased for the day. No steel had been loaded into the car on the starboard stern of the float and only a small quantity in the car directly ahead of it.* The Assistant Marine Superintendent and Marine Supervisor went home with knowledge of this fact and that the carfloat had a list to port, was down at the bow with a freeboard there of less than ten inches, and contained water in varying depths in numerous compartments (Lib. A. p. 14, 15, 165). Their only instruction to the despatcher on duty was that Carfloat 60 should be towed stern first when it was moved to its destination (Lib. A. p. 15).

During the evening, after the departure of the persons who admitted they were in charge of the railroad's marine operation, various tug boat captains reported to the despatcher in varying terminology their concern about Carfloat 60's condition (Lib. A. p. 47, 109, 110).

Some time after 11:00 p.m., a floatman from the tug despatched to move the carfloat discovered the forward end of the float to be under water to such an extent that water was pouring through the ondeck ventilators into compartment No. 3. The tug captain refused to tow the carfloat because of its condition (Lib. A. p. 132-135, 150-153). Shortly thereafter, the gondola cars on the starboard track of the float broke their chains, and rolled forward into the river. The sudden reduction in weight on the starboard

---

*Erroneously described by trial court in Finding of Fact #3 as "portside". But see Lib. A., p. 33.

side caused the carfloat to backlash and caused the cars on the port side of the float to fall into the river and the cars on the center track to topple on their sides, spewing their contents onto the float or into the river (Lib. A. p. 135-136).

Subsequently a survey of the carfloat disclosed (a) a hole about 3 by 4 inches in the port bow corner, (b) about 150 loose rivets in the lower bow angle, and (c) a pulled bounding bar which permitted leakage from the first compartment to the second compartment (Lib. A. p. 53, 54, 57).

The factual evidence is not in controversy since the only witnesses were in the employ of the railroad. The amount of the damage the railroad incurred was agreed by stipulation before trial.

The only question presented to the courts below was whether under the above facts the loss fell within the scope of the insurance contract.

The trial court found that there was "not a scintilla of evidence that anything happened other than this leakage from the time the loading of the steel ceased and the time when the vessel lost its cargo, which could properly be described as a 'Peril of the Sea'." The trial court also found that the railroad's "managing agents had full knowledge of a situation which merely had to continue to exist in order to result in the accident which eventually did occur and could have been worse."

The Court of Appeals, in reversing the trial court who had seen the witnesses and heard the testimony, found that "a concatenation of fortuitous circumstances" was disclosed by the evidence and that the damage resulted from a Peril of the Sea. The Court of Appeals seems to hold that any damage under any circumstances by the incursion of seawater results from a peril of the sea.

Reasons for the Allowance of Writ
Argument

Aside from the obligation of an assured to pay an agreed premium, there is a dearth of authority in the marine insurance field stating the duties of an assured with respect to the insured property.

No cases have been found in the field of marine insurance law sufficiently close on the facts and on policy language to serve as a solution or as precedents to the situation presented herein. Possibly the case closest to the instant one is *Union Insurance Co.* v. *Smith,* 124 U. S. 405, 427, wherein the Court said:

> "A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect."

However, that decision involved a time policy on the hull of the vessel and the policy expressly excepted losses occasioned by want of ordinary care and skill which is not the situation here.

The rule of the *Union Insurance* case was applied in *Chicago Steamship Lines* v. *U. S. Lloyds,* 2 F. (2d) 676, *aff'd,* 12 F. (2d) 733, *cert. den'd,* 273 U. S. 698. There, a loaded vessel sank alongside a dock due to water leaking through rivet holes which the owner negligently permitted to exist. The loss was due, at least in part, to the negligence of the master, and the policy expressly excepted losses due to master's negligence. The court said:

> "The negligence of the manager is not excused by the fact, if it be a fact as urged, that all vessels leak more or less, and that much less water than could have been taken care of by the pumps, had it reached them, got into the hold by reason of the manner in which the plate was attached. That is neither reason nor excuse for the carelessness of the manager, whereby more than the inevitable amount of water did get into the hold in such a manner that it was soaked up by the cargo and never reached the pumps." (12 F. 2d 737.)

The English Marine Insurance Act (1906), which purports to codify the English case law, provides that "where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." This section (§ 39 (5)), too, is limited to hull insurance and Carfloat 60 was not "sent to sea" but was moored when the accident occurred.

The First Schedule appended to the Marine Insurance Act defines "perils of the seas" as referring "only to fortuitous accidents or casualties of the sea" and as not including "the ordinary action of the winds and waves." In his commentary on the Act, Chalmers states that a peril of the sea denotes something which is accidental and fortuitous and is "perils *of* the sea," not "perils *on* the seas." He states that the term has the same meaning in a marine insurance policy as in a bill of lading or charter party. *Chalmers, Marine Insurance Act 1906* (4 ed. 1932) pp. 142, 143. As was stated in *Cary* v. *Home Ins. Co.* (1923), 235 N. Y. 296, "a peril *on* the sea is not enough." See also *Fine* v. *American Eagle Fire Ins. Co.* (1942), 178 Misc. 27.

From the language of the *Union Insurance* and the *Chicago Steamship Lines* decisions, quoted above, and of the Marine Insurance Act of England, it is clear that good

faith, diligence and some degree of prudence are required of assureds where hull policies are involved. It appears only reasonable that the same requirement is an implied condition of other forms of marine insurance and to insurance policies generally.

The assumption that a duty to exercise some degree of care with respect insured property is implicit in every contract of insurance is supported by several early state court decisions concerning fire insurance policies.

John Chandler v. *The Worcester Mutual Fire Insurance Company* (1849), 3 Cush. 328, 329, 330, was an action to recover for a fire loss under a policy of fire insurance in which the trial court excluded evidence offered by the defendant to prove that the fire resulted from gross negligence of the assured plaintiff. In setting aside the verdict in plaintiff's favor and granting a new trial, Shaw, C. J. said:

> "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitute no defence. Whether the same rule will apply equally to a case where a loss has occurred by means which the assured by ordinary care could have prevented, is a different question. . . ."
>
> ". . . Suppose the assured, in his own house, sees the burning coals in the fireplace roll down on to the wooden floor, and does not brush them up; this would be mere *nonfeasance*. It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flame begin to kindle in a small spot, which a cup of water would put out; and the assured has the water at hand, but neglects to put it on. This is mere nonfeasance; yet no one would doubt, that it

> is culpable negligence, in violaton of the maxim, *Sic utere tuo ut alienum non laedas.* To what extent such negligence must go, in order to amount to gross misconduct, it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration, that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury."

In *Gove* v. *Farmers' Mutual Fire Insurance Company* (1868), 48 N. H. 41, 43, the court discussed the *Chandler case* and said:

> "It would be fair to infer a fraudulent intent in the insured, as would be indicated in a forbearance to use all reasonable exertions to save his property from the ravages of fire, when ample preventative means and ability are at hand. Evidence of this kind of negligence will tend to discharge underwriters and insurers from their liability in case of loss."

Similarly, in *Fleisch* v. *Insurance Company of North America* (1894), 58 Mo. App. 596, 607, it was said:

> "Negligence of the assured is one of the risks insured against, but fraudulent negligence is not. Regardless of the clause in the policy, the assured could not recover, if he knew a fire had originated on the premises by his negligence which he could readily put out, if so inclined, but failed to use any effort to put it out."

While, admittedly, the foregoing cases do not control, the general principles requiring an assured to act in the protection and preservation of insured property should be applied with equal force to any insured including the respondent herein.

The trier of the facts has stated that the insured's Marine Supervisor and the Assistant Marine Superintendent (who testified that he was "responsible for the operation of the marine equipment" of the insured, Lib. A p. 11) "with full knowledge of the facts and in the face of a series of warnings, deliberately continued to load a listing carfloat" and took no measures in the interest of safety except ordering that the carfloat be towed stern first. The facts known to these supervisory personnel were that (a) a heavy cargo had been loaded aboard the float, (b) the carfloat was down at the bow with less than ten inches of freeboard, (c) the carfloat had a list to port, (d) the carfloat had water from unknown sources in several compartments. Although not mentioned by either of the courts below, these supervisory personnel were sufficiently familiar with the carfloat and the Mott Haven Yard to know that ventilator openings existed only one and one-half inches above the deck of the float into which water could pour and to know of the presence of portable pumps in the railroad yard (Lib. A. p. 173). They knew of the existence of a dangerous condition and, to apply the *Chandler case,* the cup of water was available, the broom to sweep the burning coal back into the fireplace was awaiting their hands.

And the trier of the facts found "not a scintilla of evidence that anything happened" by way of fortuity or accident which could be described as a peril of the sea—the condition precedent to liability of petitioner. It was not "a sudden and instant happening rather than a condition which develops and progresses." *Senn Products Corp.* v.

Hartford Steam Boiler I & I Co., 41 N. Y. S. (2d) 133, 137. In short the loss for which recovery is sought was not caused by an insured peril.

The Court of Appeals in its opinion has cited and quoted numerous decisions generally involving hull policies wherein the negligence, gross or simple, of crew members or masters of vessels caused or largely contributed to the loss for which recovery was sought and correctly granted. These cases are distinguishable from the present one. They compare with the negligence of master, officer or crew not preventing the owner of a vessel from limiting his liability under the limitations of liability statutes (46 U. S. C. Sec. 181 et seq.). However, the design or neglect of managerial shoreside personnel such as marine superintendents or port captains prevents limitation of liability. *The Edmund Fanning*, 201 F. (2d) 281; *New York & Cuba Mail S. S. Co.* v *Continental Ins. Co.*, 117 F. (2d) 404, *cert. den.* 313 U. S. 580; *The Erie Lighter 108*, 250 Fed. 490. In the instant case the Assistant Marine Superintendent and the Marine Supervisor of the insured are definitely shoreside and definitely managerial. If their negligence, lack of prudence or diligence is not that of their corporate employer, a corporate shipowner never can be denied recovery from its insurers.

It is submitted that the Court of Appeals' finding of a "concatenation of fortuitous circumstances (including misunderstanding by the dispatcher of some of the reports made to him about the vessel's listing)" is completely unsupported by the evidence. Additionally, what the dispatcher thought is not the basis of Petitioners' position. It is what the Assistant Marine Superintendent and Marine Supervisor testified that they knew prior to 6:00 p. m. when they went home without doing anything to protect the insured property from obvious danger.

Conclusion

For the foregoing reasons, and the compelling need for an authoritative statement of the duty of insureds (in the absence of express warranties) under contracts of marine insurance to act in the protection and preservation of the insured property, we urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL L. STONEBRIDGE

Of Counsel:

WILBUR E. DOW, JR.

APPENDIX

Opinion of the District Court

CASHIN, *D. J.*

This is an action in admiralty by the libelant, New York, New Haven and Hartford Railroad Company, for recovery on two marine insurance policies issued by the respondents, William Gray of Lloyd's underwriters and Orion Insurance Company, Ltd. of the Institute of London Underwriters.

FINDINGS OF FACT

1. Respondents duly issued to the libelant in London, England, two marine insurance policies, identical in form. These policies were in full force and effect on February 9, 1951 and read in part as follows:—

> "TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas * * * and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said goods and Merchandises and Ship, &c., or any Part thereof * * *.".
>
> "2. $500,000 in all any one accident with limits as below *on all goods, wares, merchandise, baggage, and other property;* including articles excepted in the printed part of this policy; and *on advanced charges* and *on freight charges* up to point of occurrence of loss; *belonging to the assured or held by it in trust or custody as carrier or forwarder, and for which it may be liable,* while same is in or on cars on Floats owned or employed by said Railroad Company, and/or while said cars are being hauled on or off said vessels; *and on cars belonging to the assured or in its use or possession,* while the same are on said floats or being hauled on or off of said vessels".

Opinion of the District Court

2. On February 9, 1951 libelant's steel Carfloat No. 60, a three track float, approximately 327 feet long, with a depth of 10 feet 6 inches, a draft (light) of 3 feet and divided into 17 separate compartments, was located in the Harlem River Basin off libelant's Mott Haven Yard. On the carfloat were fastened thirteen empty gondola cars, five on the starboard side, five on the portside and three in the middle track. On the morning of February 9th libelant's employees commenced loading the gondola cars with steel concrete reinforcing rods. Sometime after 2:00 p. m. libelant's employees became aware that the bow of the carfloat was settling and libelant's Assistant Marine Superintendent and Marine Supervisor, among others, were duly informed.

3. Sometime after 3:00 o'clock the Marine Supervisor inspected the float and found water in the various compartments as follows: Compartments No. 1—4 feet; No. 2—1½ feet; No. 4—2 feet; No. 7—1 foot; No. 8—2½ feet; No. 12—2 feet. The carfloat was needed the next day in its regular transfer business and the loading operation was continued until 6:00 p. m. at which time 801 tons of steel had been loaded into twelve of the thirteen cars on the float. One of the cars located on the portside of the stern end of the float was empty, and the one alongside of it was only partly filled. Libelant's Marine Supervisor and Assistant Marine Superintendent, when loading operations ceased, knew the carfloat was down at the bow with a freeboard of less than ten inches with a list to the port; had water in four of its compartments and that it was scheduled to be towed to Oak Point sometime during the night.

4. Libelant's Marine Supervisor and Assistant Marine Superintendent went home for the day at 6:00 p.m. leaving

instructions that the carfloat was to be towed stern end first. During the course of the evening the carfloat's bow continued to settle and this fact was reported to libelant's office.

5. Sometime after 11:00 o'clock a floatman (from libelant's tug Transfer 11 which had been dispatched to move the float) discovered that the forward end of the float was under water which was pouring through the ventilators into the No. 3 compartment. The tug did not attempt to move the float in this condition. At about 12:30 a.m. on February 10th the gondola cars on the starboard side of the float broke their chains and rolled forward off the float into the river and five cars on the portside fell off the side of the float by reason of the backlash. According to stipulation the damage to the cargo and railroad cars amounted to $42,438.85. An examination of the float after the accident revealed a small hole in the port bow corner and a number of loose rivets in the lower bow angle.

CONCLUSIONS OF LAW

I. Libel is dismissed.

* * *

It is our view that this case is determined by the fact that the losses incurred were not caused by "Perils of the Sea". On the facts in this case it is the Court's opinion that the immediate cause, and the only cause of the accident, was libelant's gross negligence. On February 9th, as early as 3:00 p.m., libelant's managing agents had full knowledge of a situation which merely had to continue to exist in order to result in the accident which eventually did occur and could have been worse. Libelant's Marine Supervisor and Assistant Marine Superintendent with full knowledge of the

facts, and in the face of a series of warnings, apparently in the interests of speed, deliberately continued to load a listing carfloat with a heavy cargo of steel. The only order which we believe they gave in the interest of safety was that the carfloat was to be towed stern first.

The libelant in this case went to great pains to show that a certain amount of leakage in a vessel of the Carfloat No. 60 type was usual and to be expected. There is not a scintilla of evidence that anything happened other than this leakage from the time the loading of the steel ceased and the time when the vessel lost its cargo, which could properly be described as a "Peril of the Sea". Libelant, by 6:00 P.M., through the gross negligence of its managing employees had rendered the Carfloat No. 60 unseaworthy and had placed the railroad cars and the goods insured by respondents in such a perilous position that loss was inevitable in the absence of remedial action. Libelant's failure to take any action in the face of repeated warnings from 6:00 p.m. to 12:30 a.m. was a continuation of the same type of negligent conduct which created the situation.

Although it is the tendency of the courts to construe insurance policies strictly against the insurer (*Henjes* v. *Aetna Ins. Co.*, 132 F. 2d. 715) the insured cannot, by their own wilful misconduct, enlarge the insurers' risk to include the ordinary and inevitable action of the sea with respect to an unseaworthy vessel. *Union Insurance Co.* v. *Smith*, 124 U. S. 405; *Western Assurance Co.* v. *Shaw* (CCA 3rd 1926) 11 F. 2d 495.

Opinion of the Court of Appeals

Before CLARK, Chief Judge, and FRANK and LUMBARD, Circuit Judges.

FRANK, Circuit Judge.

The trial judge denied recovery because he held that the loss incurred was not caused by any "peril of the seas." As his findings show, the loss occurred as follows: The "sea" (*i.e.*, water from the river) leaked into the carfloat; this caused the vessel to list and settle; this, in turn, caused some of the railroad's cars and their cargo to slide into the river; then the vessel lurched and other cars and their cargo also fell into the river. The judge held that railroad's employees had been guilty of "gross negligence" which was "the immediate cause and the only cause of the accident." The "gross negligence" consisted of taking a chance that the carfloat could be towed in spite of its known condition.

The loss resulted from a "peril of the seas." "It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of seawater through a hole in a pipe gnawed by rats, the House of Lords held this to be a peril of the seas."[1] That the sea is calm makes no difference.[2] Negligence, whether or not "gross,"[3] but for which the accident would not have occurred, will not serve as a defense to such a policy. Only "wilful misconduct," measuring up to "knavery" or "design," will suffice; and neither the evidence nor the judge's findings of fact show such conduct. True,

---

[1]2 Arnold, Marine Insurance (14th ed.) Section 812.

[2]Judge Rifkind in Compania T. Centro-Americana v. Alliance Ass. Co., D. C., 50 F. Supp. 986, 991; Olympia Canning Co. v. Union Marine Ins. Co., 9 Cir., 10 F. 2d 72.

[3]For criticism of the differentiation between "negligence" and "gross negligence," see, e. g., Kelly v. Malott, 7 Cir., 135 F. 74, 76; The New World v. King, 16 How. 469, 474, 14 L. Ed. 1019.

the judge, in the last paragraph of his opinion, referred to the gross negligence as if it constituted wilful misconduct. There we think he erred. In Orient Insurance Co. v. Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63, the master, before his vessel had steam up, negligently gave orders to cast off into the current of a river; as a result, the vessel was carried over a waterfall and sank. In affirming a judgment, on a verdict in favor of the plaintiffs, under a policy insuring them against "perils of the seas," the Court said, 123 U. S. at page 73, 8 S. Ct. at page 71: "But it is insisted that the court should have granted the request of the company, to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the master. Had that request been granted, in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence, as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy. The principle upon which the court below acted was that expressed by Chief Justice Gibson in American Ins. Co. v. Insley, 7 Pa. St. 223, 230, when he said that 'public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means;'[3a] for though the maxim respondeat superior is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself.'" See also Dudgeon v. Pembroke, 2 A. C. 284; Trinder, Anderson & Co. v. Thames and Mersey Mar. Ins. Co. (1895), 2 Q. B.

[3a]Cf. P. Samuel & Co. v. Dumas (1924), A. C. 431, 446, 453, where the ship was wilfully scuttled by the direction of the owner.

114; Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213, 221-223, 9 L. Ed. 691.

In Olympia Canning Co. v. Union Marine Ins. Co., 9 Cir., 10 F. 2d 72, 74, the court said: "In Davidson v. Burnand, L. R. 4 C. P. 117, the policy included perils of the sea. While the vessel was loading in the harbor her draft was increased by the weight of cargo until the discharge pipe was brought below the surface of the water. The cock of that pipe had been negligently left open. Water flowed into the hold causing injury to cargo. Willes, J., could find no distinction between loss from an accident happening through the negligence of the crew of another vessel and loss from accident happening from the negligence of the crew of the vessel on which the loss was occasioned, all such distinction having been swept aside by Dixon v. Sadler, 5 M. & W. 405. Keating, J., was of the same opinion, as was also Brett, J.,who, speaking of the manner in which the injury occurred said: 'The water got in, not by the happening of any ordinary occurrence in the ordinary course of the voyage, but by the accidental circumstances of some cock having been left open by the negligence of the crew. This is, in my opinion, sufficient to make the underwriter liable. Cases of like purport are Devaux v. J'Anson, 5 Bing. (N. C.) 515, and Walker v. Maitland, 5 Barn. & Ald. 171.' We find no case which overrules or calls in question the doctrine of the foregoing authorities. Guided thereby, we reach the conclusion that by the maritime laws and customs of England the loss in the case at bar was proximately caused by the overturning of the vessel under the impulse of tidal and river currents, although the accident would not have occurred, but for the negligent loading of cargo taken on board at Tacoma; that the overturning of the vessel was a peril of the sea, within the provisions of the insurance contract; and that the action of the sea was the immediate cause of the accident. In Smith

v. Scott, 4 Taunt. 125, Lord Mansfield said: 'I do not know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena? The sea. What was the cause that the crew of the Margaret did not prevent her from running against the other? Their gross and culpable negligence; but still, the sea did the mischief.' "

A determination by a trial judge of the existence of negligence is not a finding of fact but a legal conclusion.[4] So, too, is a determination as to "wilful misconduct." Accordingly, the judge's statement as to such conduct is not binding on us. And, as this is not a tort action, the horrendous niceties of the doctrine of so-called "proximate cause," employed in negligence suits,[5] apply in a limited manner only to insurance policies.[6]

We do not agree with the trial judge that the libelant's gross negligence was the sole cause of the accident. Nor do we agree with his conclusion that the "loss was inevitable" because of the way the carfloat was loaded and of her condition.[7] The evidence shows a concatenation of

---

[4]Barbarino v. Stanhope S. S. Co., 2 Cir., 151 F. 2d 535, 555; Kreste v. United States. 2 Cir., 158 F. 2d 575, 577-578; Dale v. Rosenfeld, 2 Cir., 229 F. 2d 855, 858.

[5]See discussion of "proximate cause" in Hentschel v. Baby Bathinette Corp., 2 Cir., 215 F. 2d 102, 105 ff. (dissenting opinion).

[6]See, e. g., Green, Proximate and Remote Cause, in Green, Essays on Tort and Crime (1933) 1 at 15-16.

[7]There is much to be said for the following statement made in its brief by appellant: "It was also the result of the actions of the sea upon her in that condition, the place and way she was moored, the words chosen by those reporting her trim to the dispatcher, and a thousand other circumstances. As a matter of hindsight, every happening is the inevitable result of its causes, but as a matter of foresight, no one can predict what causes will be operating at any given moment. Therein lies the element of fortuity that must form an element of a recoverable insurance loss. * * * It is against the unpredictable happenstance of loss through whatever set of circumstances * * * that men take out insurance policies. * * * Loss was not inevitable until water started pouring down Carfloat 60's ventilators

fortuitous circumstances (including misunderstanding by the dispatcher of some of the reports made to him about the vessel's listing).

Cases cited by appellees are inapposite: Union Ins. Co. v. Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497, related to a policy which expressly excepted perils "consequent upon" and "arising from" or "caused by incompetency of the master" or "want of ordinary care and skill in navigating said vessel," and "all unseaworthiness."[8] Diethelm & Co. v. The Flying Trader, D. C. S. D. N. Y., 141 F. Supp. 271, involved no insurance policy; it was a suit against an ocean carrier which defended on the ground that bills of lading excluded damage due to perils of the sea (and which was nevertheless required to pay for damage to cargo injured in a moderate gale). In Chicago S. S. Lines v. U. S. Lloyds, D. C. N. D. Ill., 2 F. 2d 767, affirmed, 7 Cir., 12 F. 2d 733, the policy contained an express warranty against the master's negligence.[9] Henjes v. Aetna Ins. Co., 2 Cir.,

---

less than a half hour before the loss occurred. Many unpredictable circumstances brought about the failure to restore the float to an even and level keel by pumping some water into the stern compartments or taking any of the other steps which would have prevented the accident to which the district court decision refers as a failure to take 'remedial action.' An easily rectified maladjustment in trim occurring in the course of loading, failure to set brakes or the existence of controllable leakage * * * did not render the loss non-fortuitous nor bar a recovery from the underwriters therefor in the absence of a warranty of seaworthiness or against negligence. The law of insurance is not like the law of torts to be used as an instrument of coercion upon assureds to improve operating practices. Assureds do not go into the insurance market to buy themselves an overseer."

[8]Moreover, the court affirmed a judgment for the plaintiff.

[9]The case related to an alleged abandonment and the correct interpretation of the "Inchmaree" clause in a hull insurance policy; the loss resulted from a defective condition of the hull created by a repair in drydock, a cause outside the coverage unless within an "Inchmaree" clause. The question was whether the assured had brought itself within the express condition precedent to coverage under that clause, i. e., the exercise of due diligence to guard against latent defects.

132 F. 2d 715, 720, also related to a breach of an express warranty.

Western Assur. Co. of Toronto, Canada v. Shaw, 3 Cir., 11 F. 2d 495, a case cited by the trial judge, concerned a policy expressly excepting all claims arising "from the want of ordinary care and skill in loading and stowing the cargo." Such, or related cases, we need not consider, since appellees close their brief with the statement: "It has never been maintained by the insurers that the policies in suit contain an express or implied warranty of seaworthiness; neither has it been maintained that they contain an express 'due care' warranty."

Appellees correctly disclaimed defense of an implied warranty of seaworthiness, since these are time policies.[10] However, appellees, referring to the English Marine Insurance Act (1906) as purporting to codify the English "case law," cite Section 39(5) of that Act which provides: "In a time policy there is no implied warranty that the ship shall be seaworthy at any state of the adven-

[10]There are statements in the following cases that the rule may be somewhat different in this country, i. e., that, although there may be no implied warranty of seaworthiness in a time policy, yet if the vessel is in port where repairs may be made, the insured cannot recover for any loss subsequently occurring when the vessel is at sea which is caused by the want of diligence in making the repairs; Union Ins. Co. v. Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; New York & P. R. S. S. Co. v. Aetna Ins. Co., 2 Cir., 204 F. 255, 258; Henjes v. Aetna Ins. Co., 2 Cir., 132 F. 2d 715, 719. However, as pointed out supra, the statement in the Union Ins. Co. case was obiter for the case involved an express warranty against unseaworthiness. That this was obiter is noted in the New York & P. R. S. S. Co. case, 204 F. 255, 258 (and had been noted by Judge Learned Hand in the district court, 192 F. 212, 214-215). The statement of the so-called American rule in 204 F. at page 258 was also obiter, since the court found no want of diligence. So too was the statement in the Henjes case supra, where there was a breach of an express promissory warranty.

ture, but *where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*" Appellees contend that the emphasized words relieve them of liability here. We think not. We assume, *arguendo,* (1) that the evidence showed the "privity of the assured" and (2) that, in each of the numerous trips made by this busy carfloat, it was "sent to sea" when it left its moorings. Even so, we reject appellees' contention. For, when the loading occurred and when the accident happened, the carfloat had not been "sent to sea" but was still moored. The rider to the policy expressly provides that the insurance applies while the vessel is thus moored and "while being loaded."

We reverse with directions to enter a decree in favor of appellant for its stipulated loss, together with interest and costs.